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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No.

THE CURTISS CANDY COMPANY,
Petitioner,

vs.

EARL W. CLARK, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, the Curtiss Candy Company, respectfully petitions this Court for a writ of certiorari to review a decision of the United States Emergency Court of Appeals, rendered on January 28, 1948, and an order denying Petitioner's petition for rehearing entered on March 5, 1948.

OPINION BELOW.

The opinion of the Emergency Court of Appeals appears in the record at pages 336 to 341. The order denying petition for rehearing appears in the record at page 352.

JURISDICTION.

The judgment of the Emergency Court of Appeals sought to be reviewed was entered on March 5, 1948. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U.S.C.A. App. Sec. 924(d).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Curtiss Candy Company is engaged in the manufacture and sale of candies, confections and food products, and produces a wide variety of food products in packaged form.

This case presents the question of the validity and constitutionality of General Maximum Price Regulation and of MPR 262 as interpreted by the Administrator[1] and the Emergency Court of Appeals. During March 1942 Petitioner produced and sold candy bars having certain specified wrapper weights. These label weights remained unchanged throughout the period of OPA. In the manufacture of candy bars, manufacturers necessarily produce bars having variable tolerances. By this, we mean that candy bars will be produced by the thousands

1. Administrator, Office of Price Administration. Executive Order No. 9841 transferred certain functions vested in the Temporary Controls Administrator to the Secretary of Commerce. By order of the Secretary, the Respondent is vested with authority to act herein. Respondent in this case had nothing to do with the administration of the Emergency Price Control Act during the periods involved in the complaint. We will therefore, in the interest of clarity, continue to refer to the Administrator with reference to administration of the Emergency Price Control Act.

weighing less than the label weight and by the thousands weighing more than the label weight. Individual bar weights within tolerance ranges will vary in approximately the number of bars produced. This process takes place daily. Manufacturing tolerances are permitted by the Federal Food and Drug Administration so long as the deviations are the result of manufacturing processes and the differences over or under label weight are reasonable and are the result of such manufacturing operations (R. p. 63).

Candy bars produced by Petitioner are subject to the provisions of General Maximum Price Regulation, and beginning in December 1942 certain of Petitioner's candy bars produced in substantial part from peanuts were covered by MPR 262. The question presented by this case is that of the validity and constitutionality of these regulations as interpreted by the Administrator.

The specific problem raised by the regulations is whether the maximum price under these regulations is to be determined, for the purpose of determining the issue of compliance, on the basis of the weight as designated on Petitioner's labels during the base period of March 1942, or in the alternative the lowest actual weight of bars produced in March 1942, or on the basis of the lowest average weight of bars produced in March 1942.

In this connection there is involved the subsidiary question of the significance to be given to manufacturing tolerance in determining the question of compliance.

No definite rule has ever been announced by the Administrator except in so far as is evidenced by the use of average weights made the basis of a complaint filed by the Administrator against the Petitioner in the District Court of the United States at Kansas City, Missouri[2].

2. For the Western District of Missouri, Western Division, No. 1678.

That proceeding was filed in December 1943, and is now pending.

The crux of this case lies in the fact that while the Respondent has admitted in his Answer to Petitioner's complaint in the Emergency Court of Appeals that in determining the highest price charged in March 1942, the lowest weight bar is controlling (see subparagraph (j) of paragraph 5 of Answer, R. p. 328), he nevertheless contends that for the purpose of determining whether or not Petitioner is in compliance with these regulations the average weight of bars produced in March 1942 must be compared with the average weight of bars subsequently produced. For this purpose he relies on the *Mars* case (135 F. 2d 843). That case did not involve the validity of any regulations of OPA as so construed.

OPA, except for the *Mars* case, after trying hundreds of cases never once argued that the selling price in March 1942 was to be determined on the basis of average selling price. No case can be found sustaining that view. *Bowles* v. *J. E. Kennemore*, 139 F. 2d 541, is to the contrary. It was decided after the *Mars* case. In administering the Fair Labor Standards Act, the courts have uniformly refused to permit proof of overtime compensation claims on a showing of average overtime. In *Jax Beer Co.* v. *Redfern* (C. C. A. 5, 1941), 124 F. 2d 172, 175, the court states:

> "Aside, however, from the nature of the work performed by Redfern and Wadsworth, the evidence is not sufficient to support the verdict and the judgment. Neither plaintiff was able to testify as to the number of hours worked each day, *but each testified that 'on an average' they worked from seven o'clock in the morning until nine o'clock at night.*"

The complaint in the Emergency Court of Appeals was directed to the issue of the validity of the regulations

as so construed to determine compliance on the basis of average weights of packaged food products rather than label weight or actual lowest running weight. It was urged that the regulations were invalid because,

1: Infinitesimal variations in bar weights do not come within the meaning of the statutory language in Section 1(a) of the EPCA providing that the Act is intended to prevent only "speculative, unwarranted and abnormal" increases in price. For this purpose due allowance must be given to manufacturing tolerances and the doctrine of *de minimis*.

2: Arbitrary and capricious. No other regulation of OPA has been so construed, and in fact other regulations dealing with packaged food commodities provide in uniform language that "where label weights are used, prices figured by weight shall be based upon the weights named on the label and not on the actual fill."

Furthermore, in our view, there is no reasonable relationship and no rational connection between the weight of a candy bar as such and the price at which it so sold by a comparison with a former weight where the price regulation involved does not freeze the formula under which the product is produced. A consumer may well have received more value by receiving less weight than he received in March 1942.

3: Throughout the period of OPA, only Petitioner and one other large candy manufacturer have been sued for treble damages on the basis of average weights. The fact that OPA during its entire history brought a treble damage action against Petitioner and only one other manufacturer of packaged dry food products in effect shows a deliberate intent on the part of OPA to inflict an ambiguous interpretation upon the two largest manufacturers in the country, leaving the balance of food

processors free from the burdens and liabilities which these cases implied. To this extent there is a denial of due process in the administration of these regulations. Such enforcement renders these regulations invalid in that as so enforced they are arbitrary and capricious and contrary to the provisions of Section 204(b) of the EPCA.

4: The Stabilization Act (Act of October 2, 1942, 56 Stat. 765) and Section 3(c) of the EPCA, require (1) that Petitioner's prices be fixed at levels existing on September 15, 1942, and (2) that a determination be made by the Price Administrator that prices to be charged by the Petitioner were sufficient to afford parity prices as provided in the Stabilization Act for farm commodities. No such determinations were made, thereby invalidating both GMPR and MPR 262 as applied to Petitioner.

SPECIFICATION OF ERRORS.

(1) The Emergency Court of Appeals erred in failing to hold that the regulations involved in these proceedings as construed by the Administrator in the manner stated in Points (2) and (3) were invalid because arbitrary and capricious, contrary to Section 204(b) of the EPCA, and that they denied Petitioner due process of law.

(2) The Emergency Court of Appeals erred in holding that GMPR and MPR 262 are to be interpreted to the effect that the average weight of a packaged food product produced in March 1942 is the applicable ceiling price, and that to determine compliance with these regulations subsequent average weights shall not be less than the base period (March 1942) average.

(3) The Emergency Court of Appeals erred in ruling that the lowest actual running weight of bars produced in the base period (disregarding completely for this purpose changes in formula) is the applicable ceiling price, and that proof thereof, as in the *Mars* case, *supra*, may be made by proof of average weight instead of proof of the lowest actual running weight.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) This case presents an important question of federal law which has been decided by the Emergency Court of Appeals in conflict with the applicable decisions of this Court.

Should the current national emergency result in a revival of price control legislation, it is of utmost importance in the administration of these regulations to know in advance the rule to be applied. Industry also should not be subjected to interpretations retroactively applied, as in this case.

Apart from this, it is a matter of grave constitutional limitation on administrative agencies not to deny due process of law by arbitrary, capricious and discriminatory action. Whether OPA has departed from this American heritage is a matter of broad public import.

(2) The Emergency Court of Appeals has also reached one of its conclusions on the basis of the *Mars* case, which is in apparent conflict with the decisions of other Circuit Courts of Appeal. This question has not been, but should be, decided by this Court.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Emergency Court of Appeals should be granted.

Respectfully submitted,

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Chicago 3, Illinois,
Attorneys for Petitioner.

Dated March 29, 1948.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No.

THE CURTISS CANDY COMPANY,
Petitioner,

vs.

EARL W. CLARK, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Rule of the Emergency Court of Appeals that the Highest Price Charged in March 1942 (by Reference to the Lowest Actual Running Weight) Is to Be Determined on the Basis of Averages, Is in Conflict with Several Decisions of the Circuit Courts of Appeal.

The Emergency Court of Appeals has stated in its opinion (R. p. 336) that while the highest price charged in March 1942 is to be determined by reference to the lowest weight of bars produced in that period, nevertheless proof of this is adequately supplied by proof of average weights in the base period, that the regulations

as so construed are valid, and that for the purpose of determining compliance the average weights of bars subsequently produced may be compared with the average weights in the base period.

The following cases will illustrate the conflict with this decision; and we also point out to this Court that the Emergency Court of Appeals is in error when it in effect holds that average weights are equivalent mathematically to using the lowest running weight of bars produced in March for the purpose of determining compliance.

In *Bowles* v. *J. E. Kennemore,* 139 F. 2d 541, the Administrator brought an action to enforce compliance with MPR 165 relating to maximum prices to be charged for dry cleaning. Regulation 165 required that every person subject to the Act should prepare and keep for examination during business hours in his place of business, a base period statement showing the highest prices charged by him in March 1942, and should file a duplicate thereof with the appropriate War Price and Rationing Board of the OPA. The question in this case was what was the highest price charged in the month of March 1942 where the defendant had several prices in effect in March 1942. The court held that the Administrator had failed to prove that the defendant had charged more than the highest prices charged by him in March 1942, and in this connection stated,

> "In neither of the trials in this case has the plaintiff contended that the usual or average price prevailing in March 1942 was controlling. On the other hand, plaintiff's counsel has constantly conceded that 'if the present service is the same or similar to a service performed in March 1942, the highest March price governs'. (Plaintiff's brief filed herein.) Whether or not the Administrator made a wise choice in fixing the ceiling prices as he did is not

a matter for the Court's consideration. The regulation must be taken as it is written."

In the complaint filed by OPA against Petitioner in the Kansas City case, the Enforcement Division alleges that Petitioner violated GMPR and MPR 262 by reducing the running weights of its candy bars subsequent to March 1942, and the exhibits and affidavits attached to the complaint indicate that the basis for the complaint was certain average running weights during the month of March 1942 and certain average weights subsequent to March 1942 during the period of the complaint. Thus, for example, on the basis of certain selected lots of candy tested during the month of March 1942 OPA alleges that a certain figure, which is the average figure, was the lowest weight of the products sold in a certain unit quantity during the month of March 1942. This figure, however, has no definite relation to the actual and true weight of any particular box sold during the month of March 1942. Damages are calculated by taking the difference between the average amount of weights sold and the theoretical average base price, being the lowest average weight of the product in March 1942, and calculating the prorata value, in terms of sales price, of the difference, which sum is taken as the basis for the damages alleged in those proceedings.

The problem of finding the highest price charged for a commodity under GMPR and which is a basis for the price adjustment provisions of MPR 262, is somewhat analogous to the problem of determining compliance with the Fair Labor Standards Act. This problem has arisen in cases claiming overtime compensation and liquidated damages in an equivalent amount of such overtime compensation under the Fair Labor Standards Act. The Fair Labor Standards Act (29 U.S.C.A. Sec. 216(b) provides as follows:

> "Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages * * *"

The Fair Labor Standards Act and the Emergency Price Control Act are similar in their general background of public policy, and the grounds of the respective causes of action are closely analogous. In the one case it is predicated upon a failure to pay to the employee the amount of earnings to which he is entitled under the Act, and in the other case there is a failure to give to the consumer that amount to which the Act states that he is entitled. Damages in both cases are assessed as being the equivalent of the loss to the employee or to the purchaser, and in the one case double damages are given, as contrasted with the treble damage provision of the Emergency Price Control Act.

The courts have had occasion to consider the problem of proof and the statement of the elements of a cause of action arising under the Fair Labor Standards Act. This has arisen in two contexts. Where it appears that the employee is engaged in the manufacture of products intended on the one hand for intrastate commerce and on the other hand for interstate commerce, the courts have found it incumbent to require him to establish definitely the percentage of his time spent in interstate commerce as the basis of figuring the amount of time subject to overtime provisions. They have also held the employee to a proof in detail of the amount of time spent in the service of his employer as the basis of ascertaining the hours worked and the wages paid.

In the case of *Jax Beer Co.* v. *Redfern* (C.C.A. 5, 1941), 124 F. 2d 172, suit was brought under the Fair Labor Standards Act for unpaid overtime compensation. The court, in the discussion of the proof offered, states as follows, on page 175:

> "Aside, however, from the nature of the work performed by Redfern and Wadsworth, the evidence is not sufficient to support the verdict and the judgment. Neither plaintiff was able to testify as to the number of hours worked each day, *but each testified that 'on an average' they worked from seven o'clock in the morning until nine o'clock at night.*"

The court further quoted certain excerpts from the testimony of the plaintiffs which indicated that the suit was based upon the average number of hours worked over a period of time, and then went on to state as follows:

> "The evidence as to the material facts in this case is so uncertain and conjectural that we find nothing substantial upon which to predicate a verdict. To uphold the findings of the judgment * * * we must base our decision upon the guess, speculation and *averages* made up from the uncertain recollection of these appellees. This we refuse to do."

The court then reversed the findings and verdict in the district court upon the insufficiency of the evidence.

A recent case following the *Jax Beer* case is *Epps* v. *Wethers* (D.C. Ga., 1943), 49 F. Supp. 2. This case also rose under the Fair Labor Standards Act, and was a suit for unpaid overtime compensation. The court, in its discussion of the evidence presented by the plaintiffs in support of their case, made the following statement:

> "It is urged upon me that the defendant admitted that the plaintiffs worked upon an average of 45 to 50 hours each week, and by accepting that average and applying the applicable minimum wage during the several years in controversy, the payments shown to have been made constitute underpayments. I did

not understand defendant to so testify. But even if he had, the Circuit Court of Appeals for this circuit has rejected the 'average hours' basis for computing wages. See *Jax Beer* case, 124 Fed. 2d, 175. The court there said notwithstanding each employee testified that 'on an average' he worked from seven a. m. to nine p. m., 'To uphold the * * * judgment (for the employees) we must base our decision upon the guess, speculation and averages made up from the uncertain recollection of these appellees. This we refuse to do.' I do likewise."

A case arising in a state court might be cited as falling within the line of authority established by the two previous cases. In the case of *Ralston* v. *Karp Metal Products Co.* (1942), 38 N.Y.S. (2), 764, a suit under the Fair Labor Standards Act, the court stated as follows:

"Assuming, arguendo, that there were times that plaintiff worked more than the specified hours fixed by law, the testimony given by him is indefinite and at most a mere estimate based upon an alleged course of conduct or an overall average for a number of years back. There is no convincing proof of the number of hours he actually worked each week."

See also, *Silgaro* v. *Post Compress Co.* (D.C. Texas, 1942), 45 F. Supp. 88, in which it was held that the plaintiff must prove the exact percentage of time spent by him in employment in interstate commerce, and that a general percentage figure over a period of time would not be sufficient to sustain the burden of proof.

In the case of *Johnson* v. *Dierks Lumber & Coal Co.* (C.C.A. 8), 130 F. 2d 115, the court stated as follows:

"The important question to be determined is whether the evidence as to the number of hours of overtime claimed to have been worked by the plaintiffs is too indefinite to support a verdict for the plaintiffs or for any of them. In an action for un-

paid compensation and liquidated damages brought under the Fair Labor Standards Act of 1938, the burden is upon the plaintiff to establish by a preponderance of the evidence the number of hours worked and the amount of wages due, and the evidence to sustain this burden must be definite and certain." (Citing cases).

The Respondent has stated in his Answer to the complaint, at subparagraph (j) of paragraph 5 of the Answer (R. p. 328), that the lowest weight bar produced in March 1942 is the appropriate ceiling price. Petitioner urges that the proper interpretation of General Maximum Price Regulation and of MPR 262, to sustain the validity of these regulations, requires a finding that its maximum prices in March 1942 were either the lowest weight bar produced in March 1942 or the label weight (paragraph (3) of the prayer for relief in the complaint, R. p. 320). Neither of these interpretations would be consistent with the ruling in the *Mars* case (135 F. 2d 843) to the effect that the maximum price charged in March 1942 is to be determined on the basis of the lowest average weight of bars produced in March 1942. The following illustrates possible interpretations of these regulations for the purpose of determining ceiling price and compliance:

(a) Lowest average weight in March 1942 as ceiling, and no candy bar may be produced having a running weight less than this low average weight.

(b) Ceiling price fixed on the basis of the lowest average weight in March 1942, and compliance on the basis of subsequent averages. The subsequent average weights to be not less than the March low average weight. This is the *Mars* case.

(c) Lowest actual running weight bar produced in March is the ceiling. Thereafter, to be in compliance, no bar should be produced weighing less than this ceiling weight.

(d) The lowest actual running weight in March 1942 becomes the ceiling price, and thereafter the average weight of bars produced shall not be less than this March ceiling weight. This latter rule is a corollary of the *Mars* case.

In the *Mars* case the Court adopted an average weight for March as the ceiling weight and then said that to be in compliance the manufacturer had to produce bars which on the average did not weigh less than the low March average. In other words, if a ceiling weight is fixed, then compliance must be determined on the basis of the average weights. We urge that there is no authority for fixing a ceiling weight in March on the basis of averages; that there is nothing in either of the regulations mentioned which provides for the mathematics for determining these averages. For example, is the average to be determined on the basis of monthly production records, weekly, daily, or a single production run? And is compliance to be determined on the basis of the average over a yearly period, or monthly, or what is the rule?

The fact remains that OPA, except in the *Mars* case, after trying hundreds of cases, never once argued that the ceiling price in March 1942 was to be determined on the basis of average selling price. No case can be found sustaining that view. The cases cited above are to the contrary.

We should like to point out that interpretation (c) above is not synonymous mathematically with rule (b) above, the *Mars* case. This, for the simple reason that in the latter case averages may be distorted by the frequency of weights with such variations to give greater emphasis in averaging to a higher or lower weight, depending upon where the frequencies fall. The following will illustrate this principle:

Assume that the lowest weight bar produced in March 1942 is 1.76 oz., and that the average weight in March is 1.856 oz. Under rule (c) no bar can be produced weighing less than 1.76 oz. Under rule (b) above, subsequent average weights shall not be less than 1.856 oz.

The following schedule of weights of bars produced subsequent to March 1942 will illustrate the difference in these rules: Assume bars produced at the following weights:

(1)	(2)
1.76 oz.	1.76 oz.
1.76 "	1.77 "
1.76 "	1.78 "
1.77 "	1.77 "
1.78 "	1.79 "
1.78 "	1.80 "
1.79 "	1.81 "
1.79 "	1.88 "
1.80 "	1.90 "
1.81 "	1.91 "
1.82 "	1.91 "
1.84 "	1.91 "
1.85 "	1.92 "
1.87 "	1.93 "
1.90 "	1.94 "

The average weight of bars produced in column (1) is 1.805 oz. The average weight of bars produced in column (2) is 1.856 oz. Column (2) is in compliance with rule (b), but if rule (b) were applied to column (1) the manufacturer would not be in compliance and would be subject to a treble damage action, although of course he is in full compliance with rule (c).

We think the rule in this case (if label weight is not controlling) should be the interpretation set forth in

clause (d) above, but at any rate it should not be more stringent than the interpretation described in clause (c) above.

It is difficult to determine from the opinion what interpretation the Emergency Court of Appeals is applying to this case, in view of the statement at page 2 of the opinion that:

> "Complainant attacks the interpretation of the regulations by the Administrator to the effect that they prohibited the reduction of the weight of candy bars *below the lowest actual running weight* thereof during March 1942, regardless of any statement as to weight on the labels of the packages, unless the reduction of weight was accompanied by a corresponding reduction in the seller's March 1942 price."

and the subsequent statement immediately following that "this interpretation was approved by the Circuit Court of Appeals for the Eighth Circuit in *Brown* v. *Mars, Inc.*, 135 F. 2d 843." As indicated by the mathematics above outlined, this of course is not true.

Arbitrary and Discriminatory Character of the Regulations.

The Petitioner, like all members of the candy and confection industry, or for that matter, any industry which sells packaged or canned commodities by weight, is required by the Food, Drug and Cosmetics Act and by the Food and Drug Administration, by regulation, to state on the label or wrapper covering such commodities, the weight of the commodity. (R. p. 58). In determining competitive conditions in the industry, members of the industry look to the label weight. When the consumer buys a commodity manufactured by Petitioner, or by any other member of an industry selling packaged or canned commodities by weight, he looks to the label

weight, for that is the only information he has as to the weight content of the commodity (R. p. 59). If Petitioner manufactures and sells a Baby Ruth candy bar, for example, having a label weight of 2 ounces, and the bar actually weighs 2.05 ounces, the .05 ounce, so far as the consumer is concerned, is a gift or gratuity. Likewise, if the bar weighs less than 2 ounces, that is one of the consequences of manufacturing tolerances, and the buyer takes his chances on such infinitesimal differences in weight. These infinitesimal changes in the weights of candy bars manufactured by Petitioner, which can be determined only after the candy bar is manufactured, come clearly within the doctrine of *de minimis non curat les* (*Anderson* v. *Mt. Clemens Pottery Co.*, (69 *F.* Supp. 710, decision on remand of Supreme Court in 66 S. Ct. 1187)). The amounts of variations in weights of candy bars involved in this case are much less than the so-called "make-ready" time spent in the *Mt. Clemens* case. Variations in candy bar weights in the *Curtiss* Kansas City case are alleged in terms of hundredths of an ounce.

The practice of allowing the consumer something over or under label weight is the result of manufacturing necessity. It has therefore become the policy of the industry to disregard tolerances in determining competitive conditions because each manufacturer's manufacturing facilities are different, and the amount of tolerance to be allowed in any case is dependent upon the mechanical genius of the manufacturer and the type of candy bar manufactured. In some cases it is difficult to manufacture candy bars within any specified tolerances. (R. p. 47).

Neither the Act nor GMPR nor MPR 262 makes any specific reference to tolerance weights over or under label weights. A manufacture sells according to label

weights, not according to actual running weights. The Administrator has recognized this fact in many regulations which specifically disregard tolerance over or under label weights.

The first of such regulations issued by the Price Administrator was issued on July 17, 1942, in connection with bar or packaged soaps or cleansers (Commodity Practices Regulation 1). This regulation gave soap manufacturers four days within which to adjust their weights. It also recognized label weights as controlling. In addition, the following regulations have been issued recognizing label weights:

MPR 473—Fruit Preserves, Jams and Jellies (Sec. n(g))

MPR 498—Apple Butter (Sec. 2(h))

MPR 335—Peanuts and Peanut Butter (Sec. 4(h))

MPR 457—Potato Chips (Sec. 2(c))

MPR 502—Popcorn (Sec. 2(f))

MPR 409—Frozen Fruits Sec. 3(g))

Food Products Order, Regulation 1, Sec. 3.2 (this regulation covers hundreds of commodities in packaged form).

The following orders have been issued by OPA in connection with special pricing regulations specifically recognizing label weight:

Docket No. GF3-2770, Order No. 176, under Section 1499.18(b) GMPR, as to Rockwood & Company's "Pecan Feast" bar. 8 F.R. 1129, Jan. 22, 1943.

Docket No. GF3-1288, Order No. 174, under 1499-.18(b) GMPR, as to Wilbur-Suchard Chocolate Co., Inc. 8 & 16 oz. package of "Chocolate Squares". 8 F.R. 1128.

Docket No. N-6352-13b-101-7, Order No. 38, under 1499.3(b) GMPR, as to E. J. Brach & Sons "4 oz. South Sea Jellies", May 31, 1944.

Docket No. GF3-604, Order No. 170, under 1499.18(b) GMPR, as to Veribrite Factory of Chicago, owned and operated by the National Candy Co. of St. Louis, "Veribrite" lozenge packages, 8 F.R. 1035, Jan. 20, 1943.

Docket No. GF3-2794, Order No. 186, under 1499.18 (b) GMPR, as to Peter Paul, Inc. "Mounds", 8 F.R. 1636, Feb. 8, 1943.

Docket No. GF3-2001, Order No. 98, under 1499.18(b) GMPR, as to Dante Candy Co., Inc. "Doctor's Orders", "Challenger", "Plum Good", and "Vita Date Bars". 7 F.R. 9433, Nov. 14, 1942.

Docket No. GF3013, Order No. 175, under 1499.18(b) GMPR, as to Brach's Candies Specialties Co. "Almond Nougat", 8 F.R. 1128, Jan. 22, 1943.

Bachman Chocolate Co. "Old Sol" bar, 8 F.R. 3523, March 23, 1943.

"That E. J. Brach & Sons, Chicago, Ill., is authorized to sell to wholesalers its 5¢ retail 1 3/4 Chocolate Pudding Bar, packed 24 to box, at the maximum price of 68 cents per box * * *" 8 F.R. 11036.

In addition, the pricing of peanut candy is covered by MPR 262, which makes no specific reference to the question of label weights in determining the new price of peanut candy, but MPR 335, which relates to peanuts and peanut butter, specifically provides for the use of label weights as controlling in determining prices. There is an obvious inconsistency in dealing with the same basic commodity. Also, potato chips and egg noodles were originally covered in MPR 262, but were picked out of this order, and separate price orders were issued. Potato chips are covered by MPR 457, which specifically provides for the use of label weights as controlling, and Food Price Regulation 1, Supplements 1 and 2, deal with noodles; and, as previously pointed out, label weights control as to these commodities. An obvious inconsistency is also apparent in this case.

Also, Section 2.4 of Supplemental Regulation 14C relating to hard candy domestically manufactured and imported, establishes specific dollar and cents prices for hard candy based on label weights in connection with packaged candy.

In each of the foregoing cases where label weights are expressed as controlling, OPA has adopted uniform language in the orders, which reads as follows: "Where label weights are used, prices figured by weight shall be based on the weights named on the label, and not on the actual fill".

In various regulations relating to scrap iron, tolerances are allowed in the percentage of content of extraneous matter, such tolerances being based on carload lots of scrap metal. See Price Regulations 2, 3, 4, 8, 12, 17, 20, 112, 113 and 123.

What is included in the sale is often governed by trade customs; for example, see P.R. 1, second-hand machinery, relating to extras or the kind of "packing" normally used; also P.R. 111, as to attachments, and packing.

What extra charges or deductions shall be made are also often governed by trade customs; for example, P.R. 3, zinc scrap, deduction for foreign material; P.R. 15, relating to copper, as to premium or discount for shape and form; P.R. 17, on tin, as to premium for shape; P.R. 124, as to zinc products, allowing charges for customary extras, special sizes, gauging, etc.; P.R. 133, farm equipment, allowing charges for installation.

Tolerances are also allowed in the sense of rounding out a charge to the nearest cent or other monetary unit; for example, P.R. 186, wood containers, the price is rounded to the nearest five cents; P.R. 13, Douglas fir plywood, the price is rounded to the nearest five cents; P.R. 19, Southern pine lumber, charges for the nearest

even multiple length up to twelve feet, and over eight feet next longer even length; P.R. 26, Douglas fir lumber, the price is rounded to the nearest five cents; P.R. 181, condensed soups, the price is rounded to the nearest one cent; P.R. 197, canned fruits, the price is rounded to the nearest one cent; MPR 365, relating to the pricing of matches, provides for a 5% tolerance in determining what constitutes a "box of matches".

The argument here is to the effect that tolerance must be disregarded because the price in any event should be rounded to the label weight, as that is the nearest monetary unit.

Frequently, tolerances are also allowed in other pipe schedules or regulations than those cited above; for example, P.R. 19, Southern pine lumber, a tolerance of three inches is allowed on lengths of twelve feet, and for specified lengths, a tolerance of one-quarter inch; P.R. 25, animal hair, a ten per cent moisture content base is allowed; P.R. 26, Douglas fir lumber, lengths may vary one-quarter inch and are allowed defects in E grades up to 25%; P.R. 32, paper board, allows moisture content between 6 to 8½%; P.R. 112, anthracite, allows oversize 2%, undersize 3%, etc.; P.R. 114, wood pulp, allows 10% water content; P.R. 130, newsprint, allows a thickness tolerance of 5%; P.R. 132, relating to waterproof rubber footwear, allows a tolerance of 2% for testing; P. R. 146, hardwood lumber, allows a percent of moisture after kiln drying; P.R. 148, pork, allows removal of fat to one-half inch on five items, and other tolerances; P.R. 151, new bags, allows tolerances on weights of bags; P.R. 168, rayon yarn, allows moisture tolerances; P.R. 168, beef and veal carcasses, allows grading tolerances; P.R. 175, glass and glass containers, allows specific manufacturing tolerances; P.R. 176, hard-

wood lumber, allows for grading tolerances; P.R. 186 allows for tolerances in wood containers; P.R. 188, consumers' goods, allows a change in paint formula, for example, if kept within certain limits, say 5% of raw material costs; P.R. 202, brass allows, etc., contains a table of allowable impurities.

All of these references are indicated here for the purpose of showing a consistent policy on the part of the Administrator to recognize business practice. In this case, the Administrator had not announced a rule of general application relating to tolerances in the candy and confection industry. It may be presumed that in the absence of any such announcement he was recognizing a long established business practice in view of Section 2(h) of the Act. This proceeding indicates the Administrator had another view with respect to this practice and refused to recognize a business practice, contrary to this section.

If tolerances are not recognized, great hardship is placed upon manufacturers because of the impossibility of producing commodities within label weights or within the same tolerances from week to week. Therefore, the manufacturer was constantly subjected to the hazard of suit by the Administrator for reductions in tolerances or for variations in tolerances, none of which can be controlled with the exactness required by the Administrator's supposed rule, all contrary to the requirement of the Act that the Administrator shall establish maximum prices "which will be generally fair and equitable".

It is not difficult to find arbitrary discrimination in our case. First, a different rule specifically applies to candy manufacturers—label weight is not recognized, nor are tolerances, despite the recognition of these trade practices by OPA–in a long list of other regulations. Next,

even in the candy industry OPA issued special pricing orders recognizing label weight. Then, for the special benefit of the Curtiss Candy Company, a separate rule, unpublished and totally indefinite, has been asserted. This rule calls for the pricing of candy products on the basis of actual running weights, or on the basis of average running weights. To this day we haven't been able to find out which it is or how such base weights are to be determined. All this despite efforts in the industry to obtain a sane and sensible rule recognizing label weights.

A similar discrimination exists in our case when we compare the practice under GMPR with respect to "new" products. Under Section 1499.3 of GMPR, it has been the practice to price new products of the same general classification by using the established practice of the most nearly comparable product in the same competitive range. This has resulted in hundreds of new candy bars being sold on the market during OPA at high prices (R. pp. 51, 52) by the simple process of filing with OPA a form (Appendix A to GMPR) setting forth the product to be priced and the proposed price and setting forth information as to the most nearly comparable product. In practice, this was accomplished by the filing of a simple letter with OPA setting forth the price proposed to be used and comparing it with the "most nearly comparable product". Obviously, no reference was ever made to manufacturing tolerances or to the lowest running weight in terms of hundredths of an ounce, as all competitive manufacturers or the manufacturers of similar products had to go by was the label weight. Nevertheless, OPA has arbitrarily insisted that this Petitioner adhere to some rule for determining weights which it has never announced publicly and which it has never clearly stated.

Apart from the provisions of the Emergency Price Control Act (Section 204(b)) striking down regulations or orders of the Administrator which are arbitrary, capricious and unlawful, it is urged that the action of the Administrator in making such arbitrary distinctions between Petitioner's method of manufacturing candy bars and the pricing of such candy bars on the basis of running weights or average weights, as compared with other dry food commodities being priced on the basis of label weights, such arbitrary action deprives Petitioner of its property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States. As stated in *Liberty Paper Box Co.* v. *U. S.*, 37 F. Supp. 751:

> "But the Supreme Court has recognized a statute may be so wholly arbitrary and unreasonable in classification as to be a violation of due process. *Blodgett* v. *Holden*, 275 U. S. 142, *Heiner* v. *Donan*, 285 U. S. 312."

While the situations in which the Supreme Court of the United States has held a discriminatory classification to be a violation of due process under the Fifth Amendment are not common, one of the leading cases is that of *Heiner* v. *Donan*, 285 U. S. 312. This case involved a federal statute which was held invalid by reason of its use of a conclusive presumption that gifts made within a certain period prior to death were made in contemplation of death. Although the case concerned itself with the issue of the validity of the conclusive presumption, the court also disposed of the contention of the government that the statute was valid as constituting a classification of taxable gifts. In other words, the government contended that the effect of the presumption was simply to provide that all gifts made within a certain period before death were to be taxable as testamentary trans-

fers. The court held that on this theory the tax would be so arbitrary and capricious as to be a violation of due process under the Fifth Amendment. It stated that the classification based solely on the time elapsing between the date of gift and the date of death was so discriminatory and invalid and so lacking in reasonableness that it was capricious and denied to the taxpayer his rights under the Fifth Amendment.

Apart from the discriminatory classification, we urge that the bringing of the treble damage suit only against the Curtiss Candy Company since the *Mars* case has the effect of depriving Curtiss of its property without due process of law. It appears that there was a deliberate intent on the part of OPA to bring only this action against the Curtiss Candy Company, despite the fact that every other packaged food processor in the country is affected with the same problems. Likewise, no other action has been instituted against any other manufacturer of packaged goods, despite the fact that in each of these industries the same problems of packaging commodities with weights equivalent to label weights exist, and despite the fact that in many of these industries special regulations have been issued recognizing label weight. Such action and such deliberate action, we contend, deprives us of our property without due process of law. On this subject, see *Miller* v. *Nut Margerine Co.* (1932), 284 U. S. 498. In that case plaintiff margerine company had sold a product apparently not taxable under the oleomargarine act, in reliance upon determinations made by the courts and the Commissioner of Internal Revenue interpreting the act as inapplicable and upon the assurance from the Bureau that its product would not be taxed. Later the Commissioner changed his ruling and, while not attempting to collect taxes

from other makers of like products who had obtained injunctions in which he had acquiesced and which had become final, directed that the tax be enforced against plaintiff's entire production *ab initio*. Suit was brought in equity to enjoin collection of the tax on the ground that plaintiff's business would be destroyed. The government sought to dismiss the bill on the ground that injunctive relief could not be afforded in a case which sought only to interpret the meaning of the taxing statute. The court held in favor of the plaintiff on the ground that the action of the Commissioner was arbitrary and capricious and as such, apparently lacking in due process, and that the allegations of the discriminatory action constituted a basis of equity jurisdiction.

As stated in Vom Bauer, Federal Administrative Law, Section 401:

> "A statute whose terms create an arbitrary classification is void under the equal protection and due process clauses. Administrative discrimination is but one step removed. It consists of arbitrary classification effected by the exercise of discretion of an administrative agency acting under a valid statute. Just as an attack upon the face of a statute is resolved by application of its terms to the facts to see if an arbitrary classification has been made, so a complaint of administrative discrimination depends upon proof of facts which show that an arbitrary classification has been effected through the exercise of administrative discretion. Questions of classification in violation of the due process and equal protection clauses are mixed questions of law and fact to be decided in the independent judgment of the court. The usual instances of administrative discrimination occur, (1) when an agency enforces a statute or administrative order of general application against only part of the class to whom it is applicable, (2) where a statute or order is enforced

unequally against those subject to it, as in tax assessment cases where the property of part of those subject to a tax is assessed at a higher proportionate value than the property of others equally subject to the tax, and (3) where only particular members of a class subject to a statute or order are allowed its benefits, as where qualified negroes are excluded in the selection of jurors.

"• • • •

"[Sec. 402] Appropriate judicial relief may be had against administrative discrimination where the discrimination is systematic and intentional, or there is something which amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity.

"Although the criterion is usually said to be proof of 'systematic and intentional' discrimination the factor of intent is seldom based upon direct evidence. Almost invariably it is inferred as a matter of course from the circumstantial fact of systematic discrimination. Discrimination can hardly be systematic without being intentional. The courts ordinarily do not deal with motives alone, but with their resultant action. A single instance of discrimination may, however, be so flagrant as to demonstrate fraudulent intent. The question as to what constitutes systematic discrimination depends upon the facts proven in the particular case.

"The right to relief against administrative discriminations first became clear in the famous case of *Yick Wo* v. *Hopkins,* and while usually based upon the equal protection clause in the Fourteenth Amendment, it may also be accorded under the due process clause as relief against palpably arbitrary action."

The case of *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356, is usually regarded as the leading case involving discriminatory enforcement. In this case a municipal ordinance was involved. It provided that laundry licenses could not be issued "without the consent of the Board

of Supervisors". Specific proof was brought in to show that plaintiff and all other Chinese were systematically denied licenses, although all other operators received them. The court held that the discrimination was a violation of the Fourteenth Amendment. It stated:

(369) "It is contended by the petitioners * * * that they are void by reason of their administration, operating inequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed * * *"

It is not necessary to speak hypothetically—

(373) "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinance as adopted, they are applied by the Public Authorities charged with their administration, and thus representing the State itself with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to petitioner, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still without the prohibition of the Constitution."

In the case of *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 352, 353, the court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional

> and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35, 37."

In the four years during which General Maximum Price Regulation has been in effect, there has been no attempt on the part of OPA to give consideration to a proper and reasonable interpretation of GMPR as applied to the candy industry. They have been left in a state of confusion by the ambiguous and confusing interpretations referred to. The deliberate and intentional subjection of the Curtiss Candy Company to a treble damage enforcement suit and injunction proceeding clearly comes within the scope of the decisions cited. What stronger case for discriminatory prosecution can be shown when there is coupled with such prosecution a complete absence of any clear definition of the requirements of GMPR and of MPR 262. This again is emphasized by the discriminatory orders issued in favor of other candy manufacturers, and the discriminatory but more reasonable regulations applied to other dry packaged food commodities cited in this brief.

The opinion of the Emergency Court of Appeals at page 5 states that "there must be evidence that the group complaining has been affected unfairly and inequitably and that no reasonable basis exists for the difference in treatment accorded the various groups." The Court found no evidence of this character.

Attention is respectfully called to the testimony in the record at pages 103 to 105, to the effect that the pro-

duction of other dry food commodities was affected by the same problems of weight control confronted in the case of candy bars. In fact, Petitioner in this case produces many of the items referred to in the testimony which are covered by regulations of the Administrator specifically recognizing label weight for the purpose of determining price and compliance.

While the Administrator may not be required to establish precisely the same kind of price-fixing regulations for candy bars as he did for soap and other articles, nevertheless we respectfully suggest that the interpretation which the Administrator gave to the problem of tolerances and running weights in connection with soap when General Maximum Price Regulation was barely a few weeks old, evidences the only reasonable interpretation to be given to General Max. It was the kind of interpretation which the Administrator uniformly applied to dry food commodities. Only the enforcement proceedings against Mars and the Petitioner suggest a different theory. This is discrimination run rampant.

Section 3(c) of the Emergency Price Control Act and Section 3 of the Stabilization Act of 1942 Required the Price Administrator to Make Certain Findings of Fact. The Emergency Court of Appeals Has Failed to Give Consideration to the Decisions of this Court Requiring that Such Findings of Fact Be Made to Sustain the Validity of a Price Regulation.

The statement of considerations issued contemporaneously with the issuance of GMPR clearly shows that absolutely no consideration was given to the provisions of Section 3(c) of the Emergency Price Control Act providing that no maximum price shall be established or maintained for any commodity processed in whole or in substantial part from any agricultural commodity below

a price which will reflect to the producers of such agricultural commodity a price therefor equal to the highest price provided in subsection (a). Certainly no consideration was ever given, subsequent to the issuance of GMPR, to the provisions of Section 3 of the Stabilization Act. None of the determinations required to be made by the Administrator under Section 3(c) of the EPCA and of Section 3 of the Stabilization Act was ever made by the Administrator, or, for that matter, by anyone having anything to do with the pricing of Petitioner's products. The absence of such determinations by the Administrator renders the continued effect of such regulations invalid under the rule announced by this Court in *Thomas Paper Stock Co.* v. *Porter* (1946), 3 PC par. 52, 526, 66 S. Ct. 884.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition should be allowed and the judgment of the Emergency Court of Appeals reviewed and reversed.

Respectfully submitted,

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